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From:

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To:

Cc:

Subject: FW: Your views on plan revocation

In response to your first question, the rule on who is authorized to sign a consent to extend the time to assess tax on an employee plan is directly tied to who is authorized to sign the plan's returns. See Rev. Rul. 83-41, 1983-1 C.B. 349 (providing that "the Service will generally apply the rules applicable to the execution of the original returns to consents to the extension of time to make an assessment"). Therefore, whoever is authorized to sign the annual returns (e.g., Forms 5500, Schedule P (Form 5500)) of the relevant taxpayer, including the taxpayer's agent, or a fiduciary of the t/p, such as a trustee, is the proper person to sign the Form 872. By relevant taxpayer, I mean the one under examination and against whom the tax would be assessed.

IRM 25.6.22 is the chapter devoted to consents to extend the assessment period, and IRM 25.6.22.6.13 explains in some detail consents w/ respect to employee plans. It reads:

(1) Form 872 or 872-A is used to extend the statute for assessment of taxes under Chapter 43 (Qualified Pension, Etc., Plans) of the Code.

(2) The statutory period for assessment of the IRC § 4975(a) excise tax on a disqualified person may be extended when necessary by securing an executed Form 872 or 872-A for each year in which transactions occur that give rise to the excise tax. The consent must always be obtained from the person upon whom the tax is imposed, even though the period of limitations is determined by the due date of the annual return (Form 5500 series) or the date the return is filed, whichever is later.

* * * *

(4) Form 5500 is filed by the employer maintaining the plan or the plan administrator and the consent must be signed by the employer or plan administrator. If Schedule P (Annual Return of Fiduciary of Employer Benefit Trust) is filed with the Form 5500, the Schedule P is a jurat signed by a plan trustee and filed by the employer or the plan administrator that allows the trustee under penalties of perjury to treat the information in the Form 5500 as the trustee's return information. The consent for the trust must be signed by the trustee.

Presumably, the same principles apply for a consent to extend income, as opposed to excise, taxes.

While it's not authoritative or precedential, there may be some informational value to you in looking at a 1998 FSA (1998 WL 1984762) concerning the effectiveness of Forms 872 signed by an assistant treasurer on behalf of a corporate employer purporting to extend the assessment periods for income and section 4975(a) excise taxes on an employees-retirement plan and 401(k) plan. The applicable returns were filed on Schedule P of the Form 5500. The conclusion of the FSA was that the Forms 872 were ineffective because the treasurer was not a trust fiduciary and hence not the person w/ authority to sign the schedule P.

As to the particular question of whether a sponsoring (and participating) employer in a multiple-employer plan may, by virtue of that status, execute a consent that would be effective for the assessment of taxes resulting from the disqualification of the plan, I'm inclined to think the answer is no given the above. In other words, for a multiple-employer plan, the plan administrator (or the trustee, as applicable) must consent. It would seem to me that for a one-employer plan, by contrast, the employer that maintains the plan--the sponsor, I suppose--signs and files the annual returns for the plan and would thus be the one to sign a consent. But I also recognize that I don't know enough about employee plans generally, the filing requirements they're subject to, and the facts of your case to know whether a sponsoring employer can in certain multiple-employer situations sign and file the plan's returns or, even if they can, whether that's the situation here. I noticed that the Form 5500 has a space for an "employer/plan sponsor" to sign, as well as a space for an administrator to sign. The form instructions unfortunately don't provide any real clarity as to who signs under what circumstances, except to say at one point, that for multiple-employer plans, "Participating employers do not file individually for these plans."

So, I'll limit anything definitive to the basics: if the consent is for (hypothetical) taxpayer X, it should be signed by whoever has the authority to sign returns for X. That may be adequate for your purposes. Otherwise, please contact me, and we can discuss further.